

## In a Case of First Impression in New York, Surrogate's Court Holds That There Is No Basis in "Law or in Logic" to Impose Forfeiture on Individual Beneficiaries Challenging an Instrument Containing an In Terrorem Clause in Their Fiduciary Capacities

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### **Beneficiaries Acting in a Fiduciary Capacity Do Not Lose Their Personal Bequests by Challenging Instruments with an In Terrorem Clause**

In a case of first impression in New York, CLM obtained dismissal of a trustee's *in terrorem* petition seeking to claw back two beneficiaries' personal bequests based on their approval – in their separate roles as directors and officers of a nonprofit organization – of a lawsuit brought by the nonprofit against the executor of the estate and trustee of a trust containing decedent's assets. No New York court had previously decided the issue of whether beneficiaries acting in a fiduciary capacity could lose their personal bequests by challenging instruments with an *in terrorem* clause. See *In re Kay*, File No. 2010-2056/D, 2024 N.Y. Misc. LEXIS 8363 (Surr. Ct. N.Y. Cty. Oct. 3, 2010).

In this case, Radio Drama Network, a nonprofit founded by radio pioneer Himan Brown, had filed a proceeding against the trustee, who was attorney-drafter of trust amendments that disinherited the nonprofit and diverted the \$100 million estate of Mr. Himan Brown to an entity that the lawyer controlled. That lawyer, as trustee of the decedent's revocable trust, then brought an *in terrorem* proceeding to claw back personal bequests to directors who were also granddaughters of Mr. Brown.

### **In Terrorem Clauses**

*In terrorem* clauses, also known as no-contest clauses, condition the receipt of a bequest on not disputing any of the terms of the will or trust. A beneficiary who challenges the will or trust will lose the bequest. While there are exceptions that allow beneficiaries to explore a potential claim without risking their bequests through limited discovery, or to structure their claim as a request to the court for construction or interpretation of the will or trust instrument, *in terrorem* clauses are enforceable in New York and, if the bequest is substantial, they can deter challenges to an estate plan.

In this case, the nonprofit initially believed it was receiving a substantial bequest through the will, but eventually learned that it had been disinherited and would receive nothing.

### **In Terrorem Clauses are Enforceable, But Are Not Favored by New York Courts and Are Strictly Construed**

Some states prohibit *in terrorem* clauses on public policy grounds and will not enforce them. The largest group of states will enforce such clauses, unless the challenge is based on probable cause or good faith. New York is among the states that will enforce *in terrorem* clauses, even if the challenge is made in good faith, but New York courts disfavor these clauses and construe them narrowly. See *Matter of Singer*, 13 N.Y.3d 447 (2009).

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The trustee in this case waited until *after* the Surrogate's Court denied a motion to dismiss the nonprofit's claim to begin a clawback proceeding. *In re Radio Drama Network, Inc.*, 2019 WL 3253613, \*5 n.2 (Surr. Ct. N.Y. Co. July 15, 2019), *aff'd*, (1st Dep't 2020) *leave to appeal denied*, 1/28/2021 N.Y.L.J. 20 (col. 6) (1st Dep't 2021). By that time, the Surrogate had found that Radio Drama Network had stated viable claims for fraud and undue influence. In many states, the *in terrorem* clause would be rendered unenforceable at that point, but that is not the rule in New York.

### **Nonprofit Directors' Actions in Fiduciary Capacity Are Not an "Indirect" Challenge to a Will or Trust**

The *in terrorem* clause in this case prohibited recipients of bequests from "direct" or "indirect" challenges to the estate plan. The trustee's petition argued that the heirs' actions in their capacity as nonprofit directors were an "indirect" challenge.

On October 3, 2024 Surrogate's Court, New York County (J. Mella) rejected the clawback attempt, holding that "Although no New York court has expressly held that will or trust contests by representatives – acting in their fiduciary capacities – who are also beneficiaries do not constitute indirect attacks resulting in forfeiture of their own gifts under challenged instruments, other jurisdictions have reached this conclusion. ... There is no basis, in law or logic, to impose a forfeiture on those who challenge an instrument in a representative capacity and do not benefit personally from their actions."

Relying on authority from Illinois and New Jersey, the court clarified that the only "indirect" challenges that will result in forfeiture of a personal bequest are when the beneficiary uses a proxy to advance their own personal interests, not when they act on behalf of a third party to whom they owe a fiduciary duty.

### **It Is Against Public Policy to Strip Directors of Nonprofit of Personal Bequests for Advancing Nonprofit's Interests**

The court went further, and held that even if it had been the decedent's intention to penalize his granddaughters in their personal capacities for the nonprofit's lawsuit, it is doubtful that a court would find such a provision enforceable, citing the out-of-state case law finding such a result "manifestly unconscionable."

### **Significance for Nonprofit Directors and Other Fiduciaries**

This decision is a significant application of the New York rule that *in terrorem* clauses are "not favored" and "strictly construed," especially in estate litigation over gifts to nonprofits or trusts in which family members play some role.

Family members receiving personal bequests often also serve in fiduciary capacities at family trusts or family foundations, and it is critical that they be able to prioritize their fiduciary duties to third parties, and are not forced to choose between resigning their fiduciary roles and risking their personal bequests.

In a companion decision issued the same day, the Surrogate also rejected the trustee's attempt to disqualify CLM as counsel for both the nonprofit and the directors in their personal capacity, rejecting the notion that there was a conflict of interest between the directors and the nonprofit based on the trustee's incorrect belief that he could hold the directors personally liable.

The *in terrorem* decision can be found [here](#). More information on the underlying claims by the nonprofit Radio Drama Network can be found [here](#).

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